MAR 1 1 1968

In the

Supreme Court of the United States

OCTOBER TERM, 1967

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE

Submitted By

AMERICAN FRIENDS SERVICE COMMITTEE,
COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST,
GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE METHODIST CHURCH,
THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY EUGENE SMATHERS, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY,
UNION OF AMERICAN HEBREW CONGREGATIONS,
CENTRAL CONFERENCE OF AMERICAN RABBIS
and
THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM

ALEX ELSON
WILLARD J. LASSERS
ELSON, LASSERS AND WOLFF
11 South La Salle Street
Chicago, Illinois 60603
Attorneys for Amici

MARVIN BRAITERMAN
2027 Massachusetts Avenue
Washington, D.C. 20036
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Motion for Leave to File Brief 1

Brief of Amici Curiae 5

Summary of Argument 6

ARGUMENT

I. The Exclusion Rule Deprives the Accused Of a Fair Trial on the Penalty Question 9

A. The crux of the Case 9

B. Religious stand against the death penalty .. 9

C. Respective roles of judge and jury 13

D. The prejudicial effect of the exclusion rule 14

II. The exclusion rule deprives an accused of a fair trial by an impartial jury on the question of guilt or innocence 19

Conclusion 23

PAGE

APPENDIX

Statements of Religious Organizations

American Baptist Convention 1a

American Ethical Union 2a

American Society of Friends 2a

Augustana Evangelical Lutheran Church of North America 3a

Christian Churches (Disciples of Christ) 4a

Church of the Brethren 5a

General Conference Mennonite Church 6a

The Methodist Church 6a

The Protestant Episcopal Church in the United States of America 7a

Union of American Hebrew Congregations 7a

Central Conference of American Rabbis 8a

United Synagogue of America 8a

Unitarian Universalist Association 9a

Council for Christian Social Action, United Church of Christ 10a

The United Presbyterian Church in the United States of America 14a

OTHER SOURCES

Statement from L'Osservatore Romano—October 21, 1959 ..... 15a

The Talmud 16a

PAGE

Table Of Authorities Cited

Cases

Alcorta v. Texas, 355 U.S. 28, 2 L.Ed.2d 9, 78 S. Ct. 103 (1957) 21

Norris v. Alabama, 294 U.S. 587, 79 L.Ed. 1074, 57 S. Ct. (1935) 14

Trop v. Dulles, 356 U.S. 86, 2 L.Ed.2d. 630, 78 S. Ct., 590 (1958) 15

Weems v. U. S., 217 U.S. 349, 366, 54 L.Ed. 793, 30 S. Ct. 544 (1910) 19

U. S. ex rel Witherspoon v. Ogilvie, 337 F.2d. 427 (CA 7th 1964) cert. den. 379 U.S. 950 (1964) 13

Constitutions

Sixth Amendment 6, 8, 19, 24

Fourteenth Amendment 6, 8, 19, 24

Statutes

Ill. Rev. Stat., 1959, C. 38, § 801 13

Ill. Rev. Stat., 1967, C. 38, §§ 1-7 (c) (1) and 9 (1) 13

Ill. Rev. Stat. (1967) C. 38, Sec. 7-1 22

Ill. Rev. Stat. (1967) C. 38, Sec. 9-1, 9-2 and 9-3 22

Other Authorities

Statistical Abstract of the United States 1951. Table 75, page 69, footnote 12, for 1900, 1910 and 1920 23

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI AMERICAN FRIENDS SERVICE COMMITTEE, COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST, GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE METHODIST CHURCH, THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY EUGENE SMATHERS, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY, UNION OF AMERICAN HEBREW CONGREGATIONS, CENTRAL CONFERENCE OF AMERICAN RABBIS and THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM

The above religious organizations by their attorneys, Alex Elson and Willard J. Lassers and Elson, Lassers and Wolff, and Marvin Braiterman, move for leave to file a brief amici curiae in support of petitioner, William C. Witherspoon. In support of this motion the religious organizations represent as follows:

These organizations believe firmly that exclusion from the jury of individuals with conscientious scruples against capital punishment is a serious deprivation of the right to an "impartial jury" under the Sixth Amendment and to due process of law under the Fourteenth Amendment. Their reasons, which are set out in the attached brief relate to certain religious and ethical considerations which are of central importance to them. These considerations, moreover, are unlikely to be viewed by the parties in quite the way they are seen by them. Consequently they believe that they can make a contribution of their own to the understanding of the case.

All of the religious organizations joining in the attached brief have taken stands in opposition to the death penalty. Because these stands reflect the belief of a majority, or perhaps more of the nation's citizens, there are special aspects of the exclusion rule now at bar, of particular concern to the feligious organizations.

The organizations are:

1. AMERICAN FRIENDS SERVICE COMMITTEE.

This organization is a non-profit corporation chartered to carry on the religious, charitable, social, philanthropic and relief work on behalf of the several divisions and branches of the Religious Society of Friends (Quakers) in America. In the United States there are approximately 123,000 Friends, organized into 28 yearly meetings. The American Friends Service Committee has a vital interest in this litigation because Quakers have strongly opposed, for religious reasons the taking of life by the State and have cherished and nurtured the liberties of free men, including the right to trial by an impartial jury. Opposition of the Friends to capital punishment goes back over three hundred years to the beginning of the Quaker movement.

2. COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST.

The Council for Christian Social Action is an instrumentality of the United Church of Christ devoted to promoting education and action in international, political and economic affairs. The Council stated its position in opposition to capital punishment in a policy statement of January 30, 1962. The United Church of Christ has over ten million adherents.

3. GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE METHODIST CHURCH.

The General Board of Christian Social Concerns is an instrumentality of the Methodist Church. Its purpose is to further the works of the church in the sphere of social affairs. The Methodist Church at its 1960 General Conference adopted a statement opposing the death penalty. The statement was revised in 1964 and is now part of the Methodist Social Creed. The Methodists number eleven million members among their 25,000 churches which are situated in every state.

4. THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY EUGENE SMATHERS, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY.

The United Presbyterian Church adopted a statement condemning the death penalty at its 171st general assembly in 1959 and adopted a revised statement at the 177th General Assembly in 1965.

The United Presbyterian Church in the United States of America has a membership of 3,300,000. It has 9,000 churches throughout the nation.

5. UNION OF AMERICAN HEBREW CONGREGATIONS, CENTRAL CONFERENCE OF AMERICAN RABBIS, and THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM.

The Union of American Hebrew Congregations (UAHC) is composed of substantially all the reform Jewish congregations in the United States, numbering about 700, having a total membership of about 1,000,000. The Central Conference of American Rabbis (CCAR) is an association composed of substantially all the 1000 reform rabbis in the United States. The Commission on Social Action, as its name suggests, is the social action arm of Reform Judaism and is a joint effort of the UAHC and the CCAR. These organizations desire to express Judaism's centuries old position discouraging the taking of human life by judicial process.

The petitioner, William C. Witherspoon, by his counsel, has executed a consent in writing to the filing of the proposed amicus brief. This consent has been filed with the clerk.

The office of the Attorney General of the State of Illinois representing respondents has informed us that it is unable to consent.

Respectfully submitted,

ALEX ELSON
WILLARD J. LASSERS
ELSON, LASSERS AND WOLFF
11 South La Salle Street
Chicago, Illinois 60603

MARVIN BRAITERMAN
2027 Massachusetts Avenue
Washington, D.C. 20036
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 1015

WILLIAM C. WITHERSPOON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS and JOSEPH WOODS, Sheriff of Cook County, Illinois,

Respondents.

BRIEF OF AMICI CURIAE
AMERICAN FRIENDS SERVICE COMMITTEE,
COUNCIL FOR CHRISTIAN SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST,
GENERAL BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE METHODIST CHURCH,
THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA BY EUGENE SMATHERS, MODERATOR AND WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY,
UNION OF AMERICAN HEBREW CONGREGATIONS,
CENTRAL CONFERENCE OF AMERICAN RABBIS and
THE COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM

The religious organizations on whose behalf this brief is filed believe that exclusion of veniremen who have con-

scientious scruples against capital punishment is a serious deprivation of the right to an impartial jury under the Sixth Amendment and of due process of law under the Fourteenth Amendment.

The interest of the amici is stated in the motion for leave to file this brief attached hereto.

SUMMARY OF ARGUMENT

Major religious organizations in the United States for both religious and secular reasons have taken stands opposing the death sentence. These views reflect the sentiments of half or more of Americans. The basic contention of the prosecution is that despite public sentiment, it is the province of the legislature to fix the penalty for crime, the death penalty so fixed is permissible, and consequently the prosecution is entitled to a jury willing to impose it. We believe there is a decisive response to this contention.

The test question excluding the scrupled juror permeates the trial with prejudice. Before evidence is heard, the jury is led to infer that the prosecution has a powerful case, one warranting death. Thus the *test question, per se,* although applicable only to the question of punishment affects the guilt-innocence determination as well, in a subtle, but powerful fashion.

The *actual exclusion* of the scrupled jurors affects the accused adversely both respecting punishment and the guilt-innocence decision. (pp. 19-20)

With respect to punishment, the defendant has his fate decided by the jury from which those with scruples against the death penalty have been removed. Those who remain are not representative of the population as a whole but differ from the general population with respect to the

relative percentages of men, their occupational status, their income levels and other factors. (pp. 17-19)

Under Illinois procedure, when the case at bar was tried and now, the jury considers simultaneously guilt or innocence and punishment. Thus an accused who claims that he is innocent has no effective opportunity to argue mitigation, for if he did so, his assertion of innocence would be gravely weakened. Thus he has no opportunity to claim that in his particular case the death sentence should not be imposed. (pp. 9-17)

A particularly tragic consequence of the foregoing is that death qualified juries sentence hundreds to a fate that our society in fact does not inflict upon them. But the condemned await months and sometimes years until their fate is finally determined. This tragic plight results from the divergence of belief between the juries we select and society generally. (pp. 17-19)

The death qualified jury moreover passes upon the guilt or innocence question even though the exclusionary rule has no application to this issue. It is a particular prejudice to the accused to have his fate so determined. Decisions regarding the objective facts of a crime are frequently difficult. Hence it is essential that the jury reflect the full range of community thinking. In addition, a decision whether a defendant has been guilty of murder, or some lesser crime, or no crime at all, frequently depends upon the accused's state of mind. (pp. 19-23)

State of mind issues generally. (insanity, reasonable cause, drunkenness (and inability to form a specific intent)) all are delicate issues for which we want a full range of community views expressed on the jury. We must recall that the jury is the sole body authorized to

determine the facts. Although questions of law are subject to appellate review, the facts in general cannot be re-examined, once determined adversely to the defendant.

The exclusionary rule, therefore, both with respect to the guilt or innocence determination and the punishment determination constitute a deprivation of the right to impartial jury under the Sixth Amendment and to due process of law under the Fourteenth Amendment.

ARGUMENT

I.

The Exclusion Rule Deprives the Accused Of a Fair Trial on the Penalty Question.

A. The Crux of the Case.

The crux of the case, in the view of the *amici* is the prosecution contention that it is the prerogative of the legislature to set the punishment for crime. The death sentence is one of the permissible penalties set. The state therefore is entitled to a jury willing to impose this penalty when the state seeks it.

We deem it essential to meet this argument squarely. We urge that the exclusion rule deprives the accused of a fair trial on the question of punishment and on the question of guilt or innocence. Although we discuss these issues separately in this brief, in Parts I and II respectfully, they are closely interrelated. The exclusion rule prejudices the accused from the beginning of the trial, casts a shadow over him during the proceedings, influences the determination of his guilt and affects his punishment.

The expression of our views requires at the outset some observations regarding the views of major religious bodies on capital punishment and the state of public opinion on this subject.

B. Religious stand against the death penalty.

The churches and synagogues of this country, in increasing numbers and in compelling terms have added their voice to those asking our country to desist once and

for all from the deliberate taking of human life by the State.

National bodies of at least 14 denominations have taken a stand against capital punishment.[1]

Of special relevance to the problem before the Court is the breadth of reasons for their stand advanced by religious organizations. They are both religious and secular in character. We make the distinction, but we do so with some hesitation because in the broad sense all of the considerations are religious. We draw a largely arbitrary line however to emphasize that many of the reasons advanced for abolishment of the death penalty have won the acceptance of those not persuaded by "religious" considerations more narrowly defined.

Turning first to the religious considerations, many churches, in varying terms speak of the sacredness of human life. The Church of the Bretheren (A. 5a)[2] puts the matter in precisely these terms referring to the Sixth Commandment. Other denominations express the concept in other language. Thus, the Baptist, (A. 1a) United Church of Christ,[3] (A. 10a) Episcopalians, (A. 7a) American Ethical Union, (A. 2a) Friends (A. 2a) and United Presbyterians (A. 14a) stress the value of human personality. The Episcopalians (A. 7a) and United Synagogue of

---

[1] See appendix to brief. In addition, numerous local church bodies have similarly committed themselves. See "What Do the Churches Say on Capital Punishment?" American Friends Service Committee Submission to the World Council of Churches (1961).

[2] All references to "A. ....." refer to the Appendix to this brief bound herewith.

[3] All references to the United Church of Christ are to the Council for Christian Social Action of the United Church of Christ, and are based on its resolution of January 30, 1962.

America (A. 8a) stress that human life is God's to take. The Baptists refer to God's mercy and love.

The Friends (A. 2a) urge that capital punishment is an act of vengeance, not of justice. The Union of American Hebrew Congregations (UAHC) (A. 7a) asserts that the death penalty is not morally justified.

There are broad areas of agreement among the denominations for opposing the supreme penalty on secular grounds. Numerous religious organizations stress that the law should aim at rehabilitation of the offender, rather than at retribution. Churches so declaring include the Baptists, (A. 1a) Christian Churches, (A. 4a) United Church of Christ, (A. 10a) Friends, (A. 2a) Lutherans, (A. 3a) Mennonites, (A. 6a) Methodists, (A. 6a) United Presbyterians, (A. 14a) and Unitarian-Universalists. (A. 9a) The Friends (A. 2a) and Christian Churches (A. 4a) state the matter not only positively but negatively as well: capital punishment promotes vengeance and injustice. Related to this argument is the contention advanced by the Baptists, (A. 1a) United Church of Christ and UAHC that the death penalty has a brutalizing influence upon society. The Christian Churches state that it is unnecessary to protect society. (A. 4a)

One of the traditional arguments in favor of capital punishment is its claimed effect as a deterrent. But the Baptists, UAHC, United Church of Christ, (A. 10a) Central Conference of American Rabbis (CCAR) (A. 8a) Lutherans, (A. 3a) and United Presbyterians (A. 14a) assert there is no proof that it does indeed deter. Several faiths, including the Baptists, (A. 1a) Church of Brethren, (A. 5a) United Church of Christ, (A. 10a) Lutherans, (A. 3a) United Presbyterians, (A. 14a) Unitarian-Universalist, (A. 9a) and Christian Churches (A. 4a) stress the fal-

libility of all human decisions and that an erroneous capital sentence once imposed, is beyond man to correct.

The United Church of Christ (A. 10a) and Christian Churches (A. 4a) asserts that it is the certainty, not the severity of punishment that deters. The death penalty is misleading in that it leads society to believe that it is dealing effectively with a serious problem. Capital punishment is unfair because it falls most heavily on the poor and on minority groups. The United Church of Christ (A. 10a) cite the world trend away from this form of punishment. See Capital Punishment, Developments 1961-1965, United Nations, 1967, p. 5.

The Roman Catholic church, to our knowledge, has not officially expressed its view on the death penalty. But L'Osservatore Romano, (A. 15a) the unofficial organ of the Vatican, commenting editorially on the Caryl Chessman case (October 21, 1959) declared itself opposed to capital punishment, referring specifically to the enormous anguish inflicted on the condemned man while awaiting the outcome of appeals and efforts at commutation.

We do not assert that these are the only arguments against capital punishment. They do represent, however, an impressive array of reasons for abolishment of the death penalty, asserting grounds appealing to Christian and Jew alike. Indeed, they appeal to those who lack formal affiliation with a faith, urging ethical considerations which we hope and indeed believe are widely shared by Americans and by mankind. They have persuaded an increasing number of Americans in recent years and now half the population adopts these views. (See amicus brief of American Civil Liberties Union (ACLU) pp. 13-19).

Despite America's growing repugnance to the death penalty, the prosecution insists upon a jury willing to

impose it. Let us analyze the respective function of the jury and of the judge. Such analysis is important to our argument.

C. Respective roles of judge and jury.

Under Illinois procedure at the time of the trial in the case at bar, the jury, when it once retired, considered first guilt or innocence, and then without a separate hearing on mitigation or aggravation, fixed the penalty. It could impose death, life, or a term of years (not less than 14). (Ill. Rev. Stat., 1959. C. 38. §801).

Although current Illinois law is somewhat different, there is today still no separate hearing on the penalty. The jury determines guilt and then may recommend the death penalty. It has no further role to play in sentencing. If the jury recommends death, the judge may impose death or a term of years (not less than 14). If the jury does not recommend death, the judge may not impose this sentence but only imprisonment. (Ill. Rev. Stat. 1967, C. 38, §§ 1-7 (c) (1) and 9 (1)

In a prior habeas corpus proceedings, the District Court held that due process required an opportunity for petitioner to present evidence in mitigation after the jury had found him guilty. The Court of Appeals reversed. *U.S. ex rel Witherspoon* v. *Ogilvie,* 337 F. 2d. 427 (CA 7th 1964) cert. den. 379 U.S. 950.

The practical consequence of the unitary trial rule in a case where the accused asserts his innocence, is to deprive the accused of an effective right to present evidence in mitigation. If he presents evidence in mitigation before the jury retires he undercuts his claim of innocence. Yet no opportunity is afforded him after the jury determines his guilt.

A final observation: in Illinois as elsewhere, the jury is the sole body authorized to determine the facts. The elaborate opportunities for appellate review offer no occasion for reconsideration of factual questions, except in narrow areas (e.g. where this court itself passes on coerced confession claims).

It is against this background that the issue at bar must be weighted.

D. The prejudicial effect of the exclusion rule.

It scarcely needs authority to assert that a jury out to be broadly representative of the public. The Sixth Amendment itself declares that the jury shall be "impartial". The twelve who sit should be drawn from persons of every race, every creed, every economic class, every stratum of society.

> *Norris v. Alabama,* 294 U.S. 587, 79 L. Ed. 1074, 57 S. Ct. (1935).

Yet the exclusion rule at bar rejects 50% of the population and perhaps more. Its sole justification can be that the exclusion is relevant to the task before the jury. In almost any other situation, a prospective juror who declared that he had conscientious scruples against a possible verdict properly would be held ineligible. But on the question of the death penalty, a special range of factors comes into play.

The death verdict is not simply one among many possible verdicts. It is one awesome to contemplate and irrevocable in result.

The arguments against the death penalty cited above and perhaps others have persuaded half or more of Amer-

ica.[4] Those left to serve on capital juries are those who have considered these arguments and found them wanting, those who on impulse declare themselves lacking scruples against the death penalty, those who have considered them but are unable to make up their mind, and those who have given no thought to the matter. The exclusion rule *assumes* without advancing proof that the class of acceptable prospective jurors and the unacceptable are identical in every respect save their opposition to the death penalty. The assumption itself is questionable and indeed appears unwarranted. Public opinion polls indicate its falsity. There do appear to be significant differences between those with conscientious scruples against capital punishment and those without. Thus, as the ACLU brief points out, pp. 15-16 the group without such scruples and hence jury acceptable differs in important respects from the group with scruples: it contains a larger percentage of men, of white collar workers and of persons in the upper income levels. There may be other elements of difference now unapparent because they have not been searched out.

At an earlier period in our history when the opponents of capital punishment were fewer, then one could contend that the class of the jury eligible was substantially identical with the population generally since the jury eligible (the non-scrupled) included all but a small portion of the citizens. But we can no longer make this assumption when we exclude 50% or even more of those otherwise eligible.

We turn to another facet of the problem. In almost every State, for almost every crime, death is but one of the possible punishments. The jury is given discretion to

---

[4] This court has declared "forceful" the arguments against capital punishment on moral grounds and in terms of accomplishing the ends of punishment. *Trop* v. *Dulles*, 356 U.S. 86, 2 L. Ed. 2d. 630, 78 S. Ct. 590 (1958)

impose or to recommend it as it sees fit. Gone, and we trust gone forever, is the rule that the mandatory penalty for murder (or other crime) was death.

If there were but a single punishment for murder, then one might contend that the choice lay between a jury willing to impose death, or an acquittal. Society would be faced with a cruel choice. But it is not. As we have stated, in substantially every state, for substantially every crime, a lesser penalty is authorized. Death is but one of the permissible punishments authorized by law. Society may be protected from the transgressor by a sentence of imprisonment and does not need the extreme sanction for its protection.

Nor is that all. The jury is given power to impose the death sentence but is given no standards for penalty imposition. This being so, we think the accused has a right to a jury which reflects the full range of community thinking on the matter, not only the harsh views, but *all* views. The State may contend that a consequence of our position is that few juries would sentence men to death. Let us take the strongest case against our position and assume this statement is true. If juries are reluctant to return a death verdict it will be a consequence of a decisive shift of public sentiment reflected in the jury room. The State, having authorized death or imprisonment, and having given the jury a voice in the penalty selection without setting standards for its exercise, ought, we submit, to accept the full range of community thought even if a consequence is that the ultimate punishment is seldom imposed.

The Talmud declares that men presumed lacking in compassion were not to be appointed to a court hearing a capital case. (See A. 16a) R. Judah added that one

who was hard-hearted was excluded (Sanhedrin 36b), R. Tarfon and R. Akiba declared that if they had sat on the Sanhedrin no man ever would have been put to death. (Mishnah Makkot, 7a). A court which executed one man in 7 years was declared destructive. To this statement one sage added the commentary that it was destructive if it executed one man in 70 years. These views are relevant to our problem: they show that men learned in a law which permitted capital punishment did not consider themselves barred from sitting as judges and that harsh courts met strong disfavor.

We need not adopt wholly these humanitarian views which weigh the scales on the side of mercy. We ask only that the scales not be weighted against the accused. We ask only that the jury embrace fully all shades of community sentiment. Thus we will avoid the horror of imposing sentences on many which we are prepared to inflict on only a few.

The exclusion rule would be rigorous enough if the accused had a realistic opportunity to present evidence in mitigation. As we have shown, however, he does not, because if he were to do so, he would undermine his defense of innocence (or of guilt of a lesser included offense). The prosecution scarcely needs to present evidence in aggravation, as the crime itself speaks on its behalf in this respect. Similarly, the defense counsel has no effective occasion to argue in mitigation, and thus convince the jury that, whatever their beliefs generally may be on capital punishment it should not be imposed in the particular instance.

A concluding observation:

The exclusion of scrupled jurors from the panel, in light of our society's deep reluctance to inflict the death penalty brings in its train another evil scarcely less

horrible than the death penalty itself: the lengthy anguish of the prisoner under sentence while he awaits disposition of his case.

L'Osservatore Romano in the 1959 editorial comment mentioned above, (p. 12. See A. 15a) called attention particularly to the agony of the condemned man. In the United States hundreds endure the agony for months. National Prisoner Statistics, Executions, for 1963-1966 reports the following:

	No. of persons under sentence of death: (End of year)	Elapsed time from sentence to disposition (Those not executed).	Number of persons executed
1963	300	22.4 months	21
1964	315	23.5 months	15
1965	331	33.3 months	7
1966	406	31.7 months	1

Thus the number of persons under sentence continues to rise while the number of persons executed declines. Those whom we do not execute—whose lives are spared by commutation, declaration of insanity, court reversals etc. are kept waiting months or years to learn their fate. At the end of 1966 it averaged *31.7 months*. There are actually two men who have been under the death sentence since 1953, still unsure of their fate. At the end of 1966 the cases of 15 persons then were pending for 97 months or more.

No doubt the reasons for this situation are complex and are not wholly assignable to any one cause or agency in society. Whatever the reasons may be, in a particular case or generally, underlying them, we believe, is our deep reluctance actually to inflict the death sentence. The exclusion rule is the point of origin for the present ghastly

business because it permits the selection of juries imposing sentences to which society has a manifest aversion. Thus the condemned man suffers a separate punishment not provided for, or contemplated by any law: a lengthy period of indecision as to his ultimate fate.

The words of Mr. Justice McKenna, said in another connection in *Weems* v. *U.S.*, 217 U.S. 349, 366, 54 L.Ed. 793, 30 S. Ct. 544 (1910) seem specially relevant: "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealth. . . ."

Here relevant is another constitutional principle voiced powerfully by this Court in *Weems*.

Constitutions "are not ephemeral enactments, designed to meet passing occasions. The future is their care and provision for events of good and bad tendencies of which no prophecy can be made." Whatever in the past may have been the justification for the exclusionary rules, that justification today no longer exists. It works powerful evils and ought today to be declared a denial of an "impartial jury" under the Sixth Amendment and of due process under the Fourteenth.

II.

The exclusion rule deprives an accused of a fair trial by an impartial jury on the question of guilt or innocence.

From the outset of the trial the exclusion rule has a subtle but undoubtedly powerful adverse effect, perhaps decisive, upon the accused. The prosecution inquiry regarding scruples against the death penalty cannot be compared to other questions customarily asked to determine juror competence. Most such questions, such as

whether the venireman knows the accused, etc., are emotionally neutral. The question on scruples against capital punishment is not neutral but itself highly prejudicial on the question of guilt or innocence. From the question itself the jury is led to infer at the very beginning of the proceedings, before a word of testimony has been heard, that the prosecution is so utterly convinced of guilt, that it feels justified in asking for the extreme penalty. The defendant thus commences his fight for life burdened with an indefinable shadow cast upon him by the jury "qualification" proceedings.

If this were the defendant's sole burden it would be serious enough. But it is not. The determination of guilt or innocence is a subtle, intricate affair. In the discussion that follows we suppose that murder is the crime since the great bulk of death sentences are imposed for that offense. There are in general two fundamental issues to be considered by the jury. The first is the "objective" question, whether the accused was responsible in a physical sense for the death of the deceased.

The second inquiry relates to the state of mind of the defendant. Not everyone responsible for a homicide commits murder or indeed necessarily commits a criminal offense. It is only, as we used to say, when the accused commits homicide "with malice aforethought" (or its modern equivalent) that murder has been done.

Let us consider the ascertainment of the "objective" facts. This task involves delicate assessment of witness credibility, weighing of testimony against physical circumstances and all the host of critical problems arising in factual determinations. Where the prosecution introduces a confession the jury has before it the especially difficult, indeed almost insoluble task, of determining

among conflicting evidence the circumstances under which the confession was given. Thereafter it must attempt to assess the effect of these circumstances upon the accused. The difficulty and hazard of this undertaking need not be stressed to this Court because this Court itself has struggled with the problem. The lengthy opinions and the number of dissenting and concurring opinions testify to the magnitude of the undertaking.

These are complex undertakings to which we should bring jurors drawn from every segment of the population. Yet the exclusion of jurors with conscientious scruples bars half, or more of the population.

When we turn to the subjective elements involved in a murder prosecution we embark upon an area of even greater difficulty. Consider *Alcorta* v. *Texas*, 355 U.S. 28 (1957). Alcorta admittedly stabbed his wife to death. As this Court said, "He admitted the killing but claimed it occured in a fit of passion when he discovered his wife, whom he had already suspected of marital infidelity, kissing one Castilleja late at night in a parked car. Petitioner relied on Texas statutes which treat killing under the influence of a 'sudden passion arising from an adequate cause . . . as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection' as murder without malice punishable by a maximum sentence of five years imprisonment. . . . The jury, however, found him guilty of murder with malice and, acting under broad statutory authority to determine the extent of punishment, sentenced him to death."

In the actual case this Court reversed the conviction because the prosecution concealed an affair between Castilleja and Mrs. Alcorta. Apart from this aspect of the case there was the question before the jury whether

Alcorta was guilty of murder with or without malice. The difference was between a maximum of death and a maximum of five years[5]

Surely the defendant is entitled to have a jury reflecting every shade of the population to bring their judgment and life experiences to bear upon this crucial question. How else can we best and fairly determine whether there was "an adequate cause" in a "person of ordinary temper," for Alcorta's sudden passion? Conduct deemed innocuous by some elements of society may be deemed passion arousing by others.

The common defense of justifiable use of force (See e.g. Ill. Rev. Stat. (1967) C. 38, Sec. 7-1) likewise demands a jury of diverse elements. Persons raised in a milieu different from that of the accused may put an entirely different interpretation on say a tavern quarrel leading to a death.

Rape cases (and a substantial proportion of death sentences are imposed for rape) present another situation where the widest community thinking should be reflected on the jury. Frequently consent is the defense. On this issue, determinative of innocence or guilt, the evidence is likely to be in utter conflict. Surely a jury truly reflecting the community is best able to judge where truth lies.

Let us simply mention other state of mind issues frequently arising: intoxication (and the ability to form a specific intent) and mental illness. Mental illness no matter how defined, requires determination of a subjective state.

---

[5] Illinois today has substantially a comparable hierarchy of punishment for murder, voluntary manslaughter, manslaughter. See Ill. Rev. Stat. (1967) C. 38, Sec. 9-1, 9-2 and 9-3).

Thus we see that the state of mind of the accused often is all important. Depending upon it, the accused may be convicted of a serious or a minor offense or may be acquitted.[6]

We come to the nub of our argument: the death qualified jury is unquestionably drawn from a restricted segment of the population. Excluded from the jury are those persuaded against the death penalty by many of the churches and synagogues of this country and by other humanitarian agencies. These individuals, were they allowed to sit, would bring to the jury valuable human insights and a range of human experience now absent.

CONCLUSION

The exclusion rule has a heavily prejudicial effect both on the punishment question and on the question of guilt or innocence. The exclusion rule comes into play the moment a venireman steps into the box. Every venireman hears the test question put to himself and his fellows. Thus, before a word of evidence has been heard, indeed before the opening statements of counsel, the jurors are led to infer that the prosecution has a powerful case against the accused, one meriting the death penalty. This circumstance alone is undobtedly prejudicial.

The exclusion rule rejects the scrupled juror, leaving available for service only those lacking commitment

---

[6] Indeed in past years with unconscious irony, but in light of what we have just said, not without justification, the government used to classify those executed among the accidental deaths. See Statistical Abstract of the United States 1951. Table 75, page 69, footnote 12, for 1900, 1910 and 1920.

against the death penalty. This group, as we have seen, differs significantly from the total population. The defendant has his guilt or innocence determined by this death qualified jury, although the death qualification rule has no application to this aspect of the case. This aspect involves determination of objective facts and subjective states, both difficult matters which peculiarly demand a jury drawn from all segments of the population.

With respect to punishment, the death qualified jury, not representative of the population as a whole, makes a decision on life or death, although a sentence of death is not necessary for the community's protection. It does this without guide from the law and it does it moreover although the defendant has been deprived of real opportunity to present evidence in mitigation or to have his counsel argue mitigation.

The exclusionary rule results in jurors willing to decree for many a sentence society is willing to impose actually upon few. The result is a growing number of condemned men in our prisons waiting for months, indeed years, until their fate is decided.

The rule of law excluding from a jury persons with conscientious scruples against capital punishment is deeply prejudicial to the accused. It is, consequently violative of the accused's right to an impartial jury under the Sixth Amendment, and to due process of law under

the Fourteenth. The amici ask this Court to hold it unconstitutional.

Respectfully submitted,

ALEX ELSON,
WILLARD J. LASSERS,
ELSON, LASSERS AND WOLFF
11 South La Salle Street
Chicago, Illinois 60603

MARVIN BRAITERMAN
2027 Massachusetts Avenue
Washington, D.C. 20036
Of Counsel.